July 18, 1995

Bertrand Kobayashi, Ph.D.
Deputy Director for Community Hospitals
Department of Health
P.O. Box 3378
Honolulu, Hawaii 96801

Dear Dr. Kobayashi:

Re: Disclosure of Patient Medical Records In Response to Clerk-Issued Subpoenas

This in reply to a memorandum from the former Deputy Director for Community Hospitals to former Attorney General Robert A. Marks, requesting an opinion concerning whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), an agency receiving a clerk-issued subpoena for patient medical records must object to the subpoena, in the absence of a court order requiring the production of the patient medical records.

This opinion request was assigned to the Office of Information Practices ("OIP") on March 21, 1995, for appropriate action and a reply.

ISSUE PRESENTED

Whether, under the UIPA, an agency must file written objections to a subpoena issued by the clerk of a State or federal court requesting the production of records protected from disclosure by the UIPA's "clearly unwarranted invasion of personal privacy" exception, in the absence of a court order specifically requiring the production of such records.

BRIEF ANSWER

No. For the reasons explained in detail below, based upon federal court decisions under the federal Freedom of Information Act, and an examination of the provisions of the UIPA and former

chapter 92E, Hawaii Revised Statutes, it is our opinion that the UIPA and the rules of pretrial discovery are two separate and distinct mechanisms for the discovery or disclosure of records. Unlike the UIPA, the rules of pretrial discovery require the production of records if relevant and not privileged. The UIPA uses an "any person" access principle, and unlike pretrial discovery rules, a requesting party's need for the information, or its relevancy are wholly immaterial in applying part II of the UIPA, entitled "Freedom of Information."

While the question is reasonably debatable, and probably should be clarified by the Legislature, it is our opinion that the exceptions in section 92F-13, Hawaii Revised Statutes, do not afford a basis to object to the discovery of records sought pursuant to a clerk-issued subpoena, or under the rules of pretrial discovery. Therefore, it is our opinion that the DOH need not object to clerk-issued subpoenas requesting patient medical records, unless the records are protected by privileges recognized under the Hawaii Rules of Civil Procedure, such as the physician-patient privilege, or by specific State confidentiality statutes, or statutes that specifically recognize discovery privileges for government records.

Nevertheless, because state and federal courts have found that individuals have a constitutional right to privacy in the contents of their medical records and medical histories, we strongly suggest that when the DOH receives a subpoena for patient medical records, it contact the Attorney General of the State of Hawaii for additional guidance. Disclosure of the patient's medical records without the patient's consent, or a court order requiring disclosure, might violate the patient's right to privacy under the Hawaii Constitution. Finally we also recommend that when an agency receives a clerk-issued subpoena requesting the production of records that would be protected from disclosure under section 92F-13(1), Hawaii Revised Statutes, the agency make reasonable efforts to notify the individual affected that the agency has received a subpoena for the individual's records, so that the individual may seek an appropriate protective order.

FACTS

Community hospital facilities operated by the Department of Health's Community Hospitals Division ("DOH") receive approximately 200 subpoenas duces tecum every month requesting the production of patient medical records.

According to the DOH's letter requesting an opinion, in the past, the DOH responded to subpoenas and other requests for medical records in the same manner as private hospitals. If there is no medical release presented, the DOH would examine the records to determine whether the physician-patient privilege applied, or whether one of the exceptions to this privilege applied. The DOH would then determine whether the requested records were protected by specific state statutes that limits disclosure only pursuant to a court order, such as the statutes dealing with mental health, HIV/AIDS, substance abuse, etc. If the physician-patient privilege and other statutes were found not to apply, the DOH would comply with the subpoena and produce the patient medical records. If the DOH found the physician-patient privilege to apply, or if the records were found to be protected by specific State statutes, the DOH would object to the subpoena.

The DOH was recently notified that the OIP informally opined that patient medical records are protected from public inspection and copying by the UIPA's "clearly unwarranted invasion of personal privacy" exception, section 92F-13(1), Hawaii Revised Statutes, and that the DOH should object to any subpoena requesting the production of a patient's medical records.

In the DOH's letter requesting an opinion, the DOH notes that because of the frequency with which the DOH receives subpoenas for patient medical records, it would need at least one additional deputy attorney general assigned to file objections to subpoenas, and to respond to motions seeking orders to compel production of the patient medical records.

DISCUSSION

I. INTRODUCTION

Except as provided in section 92F-13, "each agency upon request by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. § 92F-11(b) (Supp. 1992). Under the UIPA, the term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992) (emphasis added); Kaapu v. Aloha Tower Dev. Corp., 74 Haw. 365, 376 n.10 (1993).

Since the DOH is an "agency" for purposes of the UIPA, its records, including patient medical records, are "government records" subject to the UIPA's provisions.

II. CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY

In adopting the UIPA, the Legislature stated that "[t]he policy of conducting governmental business as openly as possible must be tempered by a recognition of the right of the people to privacy, as embodied in section 6 and 7 of article I of the Constitution of the State of Hawaii." Haw. Rev. Stat. § 92-2 (Supp. 1992). The Legislature also provided that the UIPA shall be construed to promote its underlying purposes, including to "[b]alance the individual's privacy interest and the public access interest, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy." Id. Accordingly, under the UIPA, an agency is not required to disclose "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (Supp. 1992) and (Comp. 1993).

Under the UIPA, the "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual." Haw. Rev. Stat. § 92F-14(a) (Supp. 1992). Under this balancing test, "if a privacy interest is not 'significant,' a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy." H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988); S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw S.J. 689, 690 (1988). Indeed, the legislative history of the UIPA's privacy exception indicates this exception only applies if an individual's privacy interest in a government record is "significant." See id. ("[o]nce a significant privacy interest is found, the privacy interest will be balanced against the public interest in disclosure").

In section 92F-14(b), Hawaii Revised Statutes, the Legislature set forth examples of records in which an individual possesses a significant privacy interest, including "[i]nformation relating to medical, psychiatric, or psychological history, diagnosis, condition, treatment or evaluation, other than directory information while an individual is present at such facility." In balancing the public interest in disclosure against an individual's significant privacy interest in this type of information, it is the opinion of the OIP that generally, the disclosure of an individual's medical records would constitute a clearly unwarranted invasion of personal privacy under the UIPA.

III. DISCLOSURE REQUIRED PURSUANT TO AN ORDER OF A COURT OF COMPETENT JURISDICTION

Under section 92F-12(b)(4), Hawaii Revised Statutes, an agency must disclose, any provision to the contrary notwithstanding, "[g]overnment records requested pursuant to an order of a court."

In 1992 the OIP requested the Attorney General to provide the OIP with an opinion concerning whether subpoenas issued by the various clerks of State and federal courts are considered an "order of a court" for purposes of section 92F-12(b)(4), Hawaii Revised Statutes. After examining court decisions under state and federal statutes, including the Federal Privacy Act of 1974, 5 U.S.C. § 552a ("Privacy Act") that permit disclosure of records pursuant to a court order, the Attorney General opined that a clerk-issued subpoena is not a court order for purposes of the UIPA. After considering the legislative policies underlying the UIPA, the Attorney General stated:

> As noted above, subpoenas are typically issued by clerks without any examination of the documents requested or of the interests affected. Unlike court orders, subpoenas provide no opportunity to evaluate and weigh these interests. Treating a clerk-issued subpoena as a court order would deprive all affected individuals and governmental agencies of any forum in which they may raise their concerns and in which the balancing process intended by the UIPA might occur. Thus, consistent with the purposes and policies underlying the UIPA, the language "order of a court" in Haw. Rev. Stat. § 92F-12(b)(4) should be interpreted to exclude clerk-issued subpoenas. [Footnote omitted.]

Letter from Deputy Attorney General Lynn M. Otaguro to Kathleen A. Callaghan, former OIP Director, dated July 16, 1992 at pages 4-5.

Accordingly, a clerk-issued subpoena for patient medical records maintained by the DOT is not a "court order" for purposes of section 92F-12(b)(4), Hawaii Revised Statutes, which requires disclosure "any provision to the contrary notwithstanding."

IV. EXEMPTIONS FROM DISCLOSURE UNDER THE UIPA DO NOT CREATE COGNIZABLE DISCOVERY PRIVILEGES

No Hawaii appellate court, to our knowledge, has considered the relationship between civil discovery procedures and the UIPA, or for that matter, civil discovery procedures, and Hawaii's former public records and privacy acts, section 92-52, and chapter 92E, Hawaii Revised Statutes.

The UIPA is modeled upon the Uniform Information Practices Code ("Model Code"), drafted by the National Conference of Commissioners on Uniform State Laws in 1980. An examination of various portions of the commentary to the Model Code demonstrates that the Model Code is a synthesis, with some modifications, of: (1) the federal Freedom of Information Act, 5 U.S.C. § 552 (1988) ("FOIA"), and (2) the Privacy Act. Thus, an examination of federal court decisions involving the relationship between FOIA and the discovery provisions of the Federal Rules of Civil Procedure, provide some guidance in resolving the question presented.

A. FOIA's Relationship to Discovery

Information that is available through the FOIA is likely to be available through discovery, except that unlike FOIA, discovery mechanisms impose a relevancy requirement. It does not follow, however, that information unavailable under FOIA will be unavailable through discovery. See generally, Janice Toran, Information Disclosure in Civil Actions: The Federal Freedom of Information Act and the Federal Discovery Rules, 49 Geo. Wash. Law. Rev. 843 (Aug. 1991).

For example, in Jupiter Painting Contracting Co. v. United States, 87 F.R.D. 593 (E.D. Pa. 1980), the court noted that when a litigant demonstrates the relevance of the information sought, "FOIA availability should . . . defeat a claim of privilege under Rule 26(b)(1)." The court, however, recognized the error in assuming that a discovery privilege necessarily follows from exemption under the FOIA:

> With regard to a qualified privilege, such as governmental privilege, FOIA exemption cannot even indirectly delimit claims of privilege since it does not take into account the degree of need for the information exhibited

> by the [requester] . . . only for an absolute privilege, such as the attorney-client, where all [parties] stand on equal footing, does FOIA consistently track the scope of discovery availability against the Government.

Id. at 597.

The court in Pleasant Hill Bank v. United States, 58 F.R.D. 97 (W.D. Mo. 1973), reached a similar conclusion. In this tort case, the federal government refused to produce certain documents arguing in part that production would violate the disclosure exemptions of the FOIA. The court found it unnecessary to decide if the documents were exempt under the FOIA, stating "even if we posit *arguendo* that the . . . documents are exempt from disclosure, it does not necessarily follow that they are privileged for purposes of civil discovery." The court analogized the relationship between the FOIA and then proposed Federal Rules of Evidence. The proposed Rules of Evidence treated information exempt from disclosure under the FOIA as privileged for evidentiary purposes only upon a showing that disclosure would be contrary to the public interest. The court therefore concluded:

> The disclosure exemptions of the [FOIA] were not intended to and do not create or show by their own force a privilege within the meaning of Rule 26(b)(1) disqualifying a Government document from discovery. Since defendant relies only upon an assertion of exemption under the [FOIA], in the mistaken belief that exemption is equivalent to privilege, and since the documents do not bespeak privilege on their face, we are not now in a position to honor the claim of privilege.

Id. at 101; accord, Verrazano Trading Co. v. United States, 349 F. Supp. 1401, 1403 (Cust. Ct. 1972).

Similarly, in Kerr v. United States District Court, 511 F.2d 192 (9th Cir. 1975) aff'd on other grounds, 426 U.S. 363 (1976), the court rejected a defendant's claim that certain files exempt from disclosure under the FOIA were privileged from discovery. The court reasoned that the FOIA was inapplicable because the federal government was not a party to the underlying lawsuit and that, in any event, exemptions under the FOIA do not provide

evidentiary privileges from discovery.

Likewise, in Culinary Foods, Inc. v. Raychem Corp., 150 F.R.D. 122 (N.D. Ill 1993), in considering the government's objection to the discovery of Occupational Safety and Health Administration records, the court reasoned:

> As a general notion, information available under the FOIA is likely available through discovery. However, information unavailable under the FOIA is not necessarily unavailable through the discovery process. As noted by Raychem, the fact that the information sought is exempt from disclosure under the FOIA does not necessarily mean that the information is exempt from discovery. [Citations omitted.] Thus, the Department of Labor cannot rely solely on FOIA exemptions to establish a privilege in discovery. [Citations omitted.] In the FOIA context, a requesting party's need for the information is irrelevant. On the other hand, where a qualified privilege is asserted in the discovery context, the litigant's need is an important factor. Whether information is privileged from discovery depends on the relative weight of the litigant's need and the government's interest in confidentiality.

Id. at 125-126.

As stated in the above-cited George Washington Law Review article regarding the relationship of the FOIA to discovery:

> Attempts to block discovery in a non-FOIA suit through the application of FOIA exemptions ignore the essential differences between the discovery process and the FOIA request. By providing for pretrial disclosure of relevant information, discovery eliminates unfair surprise, and unnecessary delay at trial. Initially, a litigant seeking information from an adversary need establish only that the material is relevant or reasonably calculated to lead to the discovery of relevant information. In this context, the courts have interpreted

> relevance quite broadly. Even if the information sought is relevant, however, the party opposing discovery may legally refuse to make the requested disclosure if the material is privileged. Except in those rare instances when the privilege is absolute, the individual litigant's need for the information in preparing his case is the key factor considered by a court in ruling on a discovery motion. Often the ruling rests upon a balancing of the interests of the party seeking disclosure with those of the party opposing it.
>
> The absence of any consideration of need distinguishes the FOIA request from the discovery process. The FOIA explicitly makes the need of the party requesting the information irrelevant. Thus, at least in theory, the FOIA promotes increased government accountability by allowing any member of the public to peruse government documents without demonstrating a special interest in the material. On the other hand, even the most pressing need for disclosure cannot overcome an applicable FOIA exemption. The balancing of needs and interests found in the discovery context is not present in FOIA litigation. The courts have consistently held that a requesting party's rights under the FOIA "are neither increased nor decreased by reason of the fact that it claims an interest in [requested information] greater than that shared by the average member of the public."

Janice Toran, Information Disclosure in Civil Actions: The Federal Freedom of Information Act and the Federal Discovery Rules, 49 Geo. Wash. Law. Rev. 843, 851-52 (Aug. 1991) (footnotes omitted).

However, the federal courts have ruled that the FOIA is not totally irrelevant to the discovery process and that where discovery privileges are paralleled by the FOIA exemptions, the balancing test weighing the litigant's need for the information against the government's interest in confidentiality should be combined with the policies underlying the FOIA exemptions. See Culinary Foods, 150 F.R.D. at 126. As the court in Friedman v.

Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1334 (D.C. Cir. 1984) reasoned:

> Nevertheless, statutory publication shelters may have some application to discovery. These protected interests reflect a congressional judgment that certain delineated categories of documents may contain sensitive data which warrants a more considered and cautious treatment. In the context of discovery of government documents in the course of civil litigation, the courts must accord proper weight to the policies underlying these statutory protections, and to compare them with the factors supporting discovery in a particular lawsuit.

B. Privacy Act's Relationship to Discovery

In the Attorney General's opinion dated July 16, 1992, the Attorney General correctly observed that a clerk-issued subpoena is not the equivalent a court order, for purposes of the Privacy Act Exemption permitting the disclosure of Privacy Act records "pursuant to an order of a court of competent jurisdiction." 5 U.S.C. § 552a(b)(11).

As a general proposition, it appears that the essential point of this exception is that the Privacy Act "cannot be used to block the normal course of court proceedings, including court-ordered discovery." Clavir v. United States, 84 F.R.D. 512, 614 (S.D. N.Y. 1979). Exemption (b)(11) of the Privacy Act contains no standard governing the issuance of an order authorizing the disclosure of otherwise protected Privacy Act information.

However, several courts have addressed the issue with varying degrees of clarity. It has been held, for example, that because the Privacy Act does not itself create a qualified discovery privilege, a showing of "need" is not a prerequisite to initiating discovery or protected records. See Laxalt v. McClatchy, 809 F.2d 885, 888-90 (D.C. Cir. 1987); see also Weahkee v. Norton, 621 F.2d 1080, 1082 (10th Cir. 1980) (noting that objection to discovery of protected records "does not state a claim of privilege"); Ford Motor Co. v. United States, 825 F. Supp. 1081, 1093 (Ct. Int'l Trade 1993) ("[T]he Privacy Act does not establish a qualified discovery privilege that requires a party seeking disclosure [under section (b)(11)] to prove that its need for the information outweighs the privacy interest of the individual to whom the information relates"). Rather, the

Laxalt and other cases establish that the only test for discovery of Privacy Act records is "relevance" under Rule 26(b)(1) of the Federal Rules of Civil Procedure. These cases also establish that a protective order limiting discovery is a proper procedural device for protecting particularly sensitive Privacy Act protected records when subsection (b)(11) court orders are sought.

C. Pertinent UIPA Provisions

An examination of the exceptions to the freedom of information provisions of part II of the UIPA, also suggests that the UIPA and the Hawaii Rules of Civil Procedure are entirely separate mechanisms relating to the disclosure of records. In particular, under section 92F-13(2), Hawaii Revised Statutes, an agency is not required to disclose:

> (2) Government records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable.

In OIP Opinion Letter No. 94-12 (June 24, 1994), we observed that this exception is similar to section 2-103(a)(3)[1] of the Model Code. The commentary to this Model Code section states:

> Subsection (a)(3) prevents the use of the access provisions of this Article to evade discovery protections available to an agency in litigation with a third party. As a general rule, these protections consist of the attorney-client privilege and the attorney-work product rule.

Model Code § 2-103 commentary at 15 (1980) (emphasis added).

The foregoing suggests that the disclosure provisions of the

[1]Section 2-103(a)(3) of the Model Code exempts:

> (3) material prepared in anticipation of litigation which would not be available to a party in litigation with the agency under the rules of pretrial discovery for actions in the [designate appropriate court] of this State.

UIPA were not intended to permit members of the public to use the access provisions of part II of the UIPA to evade discovery protections available to an agency under pretrial discovery rules, lending further support for the proposition that the rules of pretrial discovery were intended to be a separate and distinct mechanism governing the disclosure of records.

D. Hawaii's Former Public Records and Privacy Acts

Hawaii's former "privacy act," chapter 92E, Hawaii Revised Statutes, repealed upon the adoption of the UIPA, governed the disclosure of "personal records," and the individual's access to, and right to request correction or amendment of the individual's personal records. Under former chapter 92E, Hawaii Revised Statutes, its exemptions did not permit an agency to withhold personal records that were discoverable under prevailing rules of discovery or by subpoena:

> § **92E-13 Access to personal records by order in judicial or administrative proceedings; access as authorized or required by other law.** Nothing in this chapter, including section 92E-3, shall be construed to permit or require an agency to withhold or deny access to a personal record, or any information in a personal record:
> (1) When the agency is ordered to produce, disclose, or allow access to the record or information in the record, or when discovery of such record or information is allowed by prevailing rules of discovery or by subpoena, in any judicial or administrative proceeding; or
> (2) Where any statute, administrative rule, rule of court, judicial decision, or other law authorizes an individual to gain access to a personal record or to any information in a personal record or requires that the individual be given such access.

Haw. Rev. Stat. §92E-13 (1985) (repealed, Act 292, Session Laws of Hawaii 1988) (emphases added).

E. OIP's Analysis

Despite the fact that section 92E-13, Hawaii Revised Statutes, was repealed upon the adoption of the UIPA, it was

incorporated into part III of the UIPA, entitled "Disclosure of Personal Records," in section 92F-28, Hawaii Revised Statutes. However, unlike former chapter 92E, Hawaii Revised Statutes, which established prohibitions on the public disclosure of an individual's personal record, part III of the UIPA is devoted exclusively to the individual's right to inspect, copy, and request correction or amendment of the individual's own personal record,[2] and does not apply to the freedom of information provisions of part II of the UIPA. Nevertheless, the provisions of former section 92E-13, Hawaii Revised Statutes, are relevant to some extent, as like the former chapter 92E, Hawaii Revised Statutes[3] the UIPA was intended to implement the individual's right to privacy under sections 6 and 7 of the Constitution of the State of Hawaii. See Haw. Rev. Stat. § 92F-2 (Supp. 1992). As such, in the provisions of chapter 92E, Hawaii Revised Statutes, the Legislature provided that despite the individual's constitutional right to privacy, the chapter was not intended to permit the withholding of personal records that would be discoverable in any judicial or administrative proceeding.

In contrast, unlike FOIA's exemptions which permit but do not compel the non-disclosure of federal agency records, the OIP has opined that because the UIPA was intended to implement the individual's right to privacy under the Hawaii Constitution, an agency must not disclose government records that would constitute a clearly unwarranted invasion of personal privacy under section

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[2]The UIPA's legislative history provides:

> The bill will recodify major portions of Chapter 92E, HRS, in Sections -21 to -28 except that these provisions will be limited to handling an individual's desire to see his or her own record. All other requests for access to personal records (i.e. by others) will be handled by the preceding sections of the bill. In this way, the very important right to review and correct one's own record is not confused with general access questions.

S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 691 (1988); H.R. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988) (emphases added).

[3]See Mehau v. Reed, 76 Hawai'i 101 (1994).

92F-13(1), Hawaii Revised Statutes, or records that are protected from disclosure by specific State statutes or by order of a court, under section 92F-13(4), Hawaii Revised Statutes.

Furthermore, as noted in the above-cited legal opinion from the Attorney General, provisions of the Privacy Act, which permit disclosure of an individual's personal records in response to an order of a court, do not permit disclosure of such records in response to a subpoena unless the subpoena is specifically approved by a court of competent jurisdiction. However, federal court decisions establish that the Privacy Act was not intended to establish qualified discovery privileges, and that the standard for the issuance of court ordered discovery under subsection (b)(11) of the Privacy Act is "relevance."

Based upon court decisions under the FOIA, and relevant provisions of the UIPA and of former chapter 92E, Hawaii Revised Statutes, we do not believe that the Legislature intended the exceptions in section 92F-13, Hawaii Revised Statutes, to create discovery privileges under the rules of pretrial discovery. As noted in the above-quoted law review article, like the FOIA, the UIPA employs an "any person" access principle, one that does not depend upon a showing of relevancy, or need, standards used by the courts to weigh and balance a party's right to discover material in the possession of the party's adversary or third persons. Furthermore, the Federal and Hawaii Rules of Civil Procedure contain adequate mechanisms, such as the court's authority to fashion appropriate protective orders, to prevent harm, oppression, or annoyance of the litigants and third persons.

While we concur with the Attorney General that a subpoena is not a court order under section 92F-12(b)(2), Hawaii Revised Statutes, we are also of the view that the exceptions in section 92F-13, Hawaii Revised Statutes, do not in and of themselves furnish a basis to object to a clerk-issued subpoena or other discovery request in a civil proceeding, or create a discovery privilege.[4] Nevertheless, we recommend that the Legislature

[4]We do observe, however, that statutes other than section 92F-13, Hawaii Revised Statutes, do create or recognize discovery privileges for certain categories of government records. See, e.g., Haw. Rev. Stat. §§ 325-101 (Supp. 1992) (AIDS/HIV records); 396-14 (1985) (occupational safety investigation records); Haw. Rev. Stat. § 397-12 (1985) (boiler and elevator safety investigation records); Haw. Rev. Stat. § 431:2-209(f) (Supp. 1992) (complaints, investigation reports, working papers and proprietary data possessed by Insurance Commissioner); Haw. Rev. Stat. § 624-

address this issue through clarifying legislation.

V. PATIENT'S CONSTITUTIONAL RIGHT TO PRIVACY IN MEDICAL RECORDS

While we have concluded above that the exceptions in section 92F-13, Hawaii Revised Statutes, do not in and of themselves, create cognizable discovery privileges, the OIP is constrained to point out that it is possible that DOH's disclosure of a patient's medical records without the patient's consent, or a court order requiring disclosure, might violate the patient's constitutional right to privacy under section 6 of article I of the Constitution of the State of Hawaii.

Committee of the Whole Report No. 15 noted that the right to privacy under section 6 of article I of the Constitution of the State of Hawaii was adopted to:

> insure that privacy is treated as a fundamental right for purposes of constitutional analysis. Privacy as used in this sense concerns the possible abuses in the use of highly personal and intimate information in the hands of government or private parties but is not intended to deter the government from the legitimate compilation and dissemination of data. More importantly, this privacy concept encompasses the notion that in certain highly personal and intimate matters, the individual should be afforded freedom of choice absent a compelling state interest. This right is similar to the privacy right discussed in cases such as Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973), etc.

Committee of the Whole Report No. 15, Proceedings of the Constitutional Convention of the State of Hawaii 1988, at 1024 (emphasis added).

To our knowledge, no Hawaii court has held that a patient has a constitutional right to privacy in the patient's medical records. However, our research indicates that state and federal

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25.5(b) (Supp. 1992) (peer review committee records); Act 190, Session Laws of Hawaii 1995 (health care data discovery).

courts have found that individuals have a constitutional right to privacy in the contents of their medical records, or their medical histories. In Re Search Warrant (Sealed), 810 F.2d 67 (3rd Cir. 1987); United States v. Westinghouse Elec. Corp., 638 F.2d 570 (3rd Cir. 1980); Doe v. Borough of Barrington, 729 F. Supp. 376 (D.C. M.J. 1990); Carter v. Broadlawns Medical Center, 667 F. Supp. 1269 (D.C. Iowa 1987); Heda v. Superior Court (Davis), 275 Cal. Rptr. 136 (Ct. App. Dist. 1 1990).

Furthermore, while state and federal courts have held that the right to privacy is not absolute, and may be outweighed by the legitimate interests of another party to a lawsuit, see, e.g., Jones v. Superior Court, 174 Cal. Rptr. 148 (1981), In Re Search Warrant (Sealed), 810 F.2d at 71, when the DOH receives a subpoena seeking the production of a patient's medical records, it is possible that the DOH's disclosure of those records without the patient's consent, or a court order requiring disclosure, would violate the patient's right to privacy under the Hawaii Constitution.

Accordingly, when the DOH receives a subpoena seeking the production of a patient's medical records, and the DOH has not been presented with the patient's written consent to disclose the patient's records, or a court order requiring disclosure, we strongly recommend that the DOH consult with the Attorney General of the State of Hawaii.

Finally, we suggest that when an agency receives a clerk-issued subpoena requesting the production of an individual's records that would be protected from disclosure under section 92F-13, Hawaii Revised Statutes, the agency make reasonable attempts to notify the individual affected, so that the individual may seek appropriate relief from the court.

CONCLUSION

For the reasons set forth above, it is the opinion of the OIP that the exceptions to required agency disclosure in section 92F-13, Hawaii Revised Statutes, do not furnish a basis to object to a subpoena or discovery request under the rules of pretrial discovery, and that the privileges recognized under Hawaii Rules of Civil Procedure or specific statutes other than the UIPA that create discovery privileges afford the only basis to object to the discovery of government records sought pursuant to a subpoena or discovery request. We nevertheless recommend that the Legislature clarify whether the UIPA affords a basis to object to the discovery of records protected from disclosure under the UIPA.

We suggest that when the DOH receives a subpoena seeking the production of a patient's medical records, the DOH contact the Attorney General of the State of Hawaii, since it is possible that production of the patient's records without the patient's consent or without a court order requiring disclosure, might violate the patient's right to privacy under the Hawaii Constitution.

Please contact me at 586-1404 if you should have any questions regarding this matter.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Moya T. Davenport Gray
Director

HRJ:sc
c: Heidi Rian
Deputy Attorney General